RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG - 4 2016
OFFICE OF THE CLERK

No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,
Petitioner,

v.

LORIE DAVIS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF REVERSAL

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INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Texas Criminal Defense Lawyers Association is a non-profit, voluntary, membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as

seeking to assist the courts by acting as *amicus curiae*.[1]

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[1] Pursuant to Rule 37.6, counsel note that this brief was not authored by counsel for either party, and neither the parties nor their counsel have made any monetary contribution to the preparation or submission of this brief. The law firm of Sidley Austin LLP undertook the printing and filing of this brief on a pro bono basis. The parties have consented to the filing of this brief, and letters reflecting their consent are on file with the Court.

SUMMARY OF ARGUMENT

This Court is "once again" required to examine the question of when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003). Once again, this Court must provide guidance on the development of unduly restrictive standards, which pre-judge the merits and provide too high a standard for assessing whether reasonable judges might disagree. And once again, if left standing, the Fifth Circuit's decision in this case would help perpetuate the practices of a Circuit that continues to apply too narrow a filter to its consideration of capital habeas corpus cases—despite repeated guidance from this Court.

Numerous jurists—several members of this Court and the dissenting judges in this very case—have expressed concern over the Fifth Circuit's continued abuse of the standard it applies when deciding whether to issue a certificate of appealability ("COA"). *See Jordan v. Fisher*, 135 S. Ct. 2647, 2651-52 (2015); *Buck v. Stephens*, 630 F. App'x 251, 252 (5th Cir. 2015) (Dennis, J., dissenting from denial of rehearing en banc) ("[T]he panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this court has flouted *Miller–El*'s clear command when denying a COA "). These concerns largely fall into two categories.

First, the Fifth Circuit has stepped far beyond the required threshold, conducting a detailed

analysis of the merits before concluding that an individual's constitutional claim failed. *See Miller-El*, 537 U.S. at 542. *See also Jordan*, 135 S. Ct. at 2652 n.2 (collecting cases).

Second, the Fifth Circuit has applied too high a standard in assessing whether reasonable jurists could debate a district court's denial of a habeas petition. Members of this Court have acknowledged this concern in a case where two judges had found the petitioner's claims debatable, and there was a contradictory decision from another circuit "presented with a similar claim in a comparable procedural posture," but the Fifth Circuit nonetheless rejected Jordan's COA application. *Id.* at 2651-52. *See also id.* at 2652 n.2 (collecting cases). So too here: indeed, the Fifth Circuit jumped to an adverse conclusion on an issue that members of this very Court suggested is worthy of a COA.

Both of these errors are present in the petitioner's case. There is no doubt that Mr. Buck demonstrated the kind of "substantial showing of a denial of a constitutional right" to satisfy the threshold inquiry that this Court's precedent indicates is appropriate. *Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). During Mr. Buck's capital sentencing trial, his own counsel failed to play their proper role in the continuing challenge of giving effect to "the constitutional promise of equal treatment and dignity," *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016), when they elicited a psychologist's opinion that Mr. Buck was more likely to represent a future danger to society because he is black. The State of Texas subsequently promised not

to stand in the way of attempts to reverse the death sentences of Mr. Buck and five other individuals in whose cases similar testimony had been given, but failed to abide by its word. *See Buck v. Stephens*, 623 F. App'x 668, 674 (5th Cir. 2015). Despite these facts, the Fifth Circuit denied a COA. *Id.*

Similarly, though the constitutional error at issue in this case is clear on the merits, at a minimum "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citations omitted). Before the Fifth Circuit and before this Court, numerous jurists have indicated interest in Mr. Buck's arguments in this case. *See Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (Alito, J., respecting denial of certiorari); *id.* at 35 (Sotomayor, J., dissenting from denial of certiorari).

This Court should reverse the Fifth Circuit's decision not to reopen the judgment in Mr. Buck's case, which was arrived at through that court's continuing practice of prematurely judging cases, rather than allowing full appellate review of potentially meritorious claims, and despite the State of Texas' broken promise to remedy what it admitted to be the "pernicious" effect of racial discrimination on the administration of justice. Resp. to Pet. for Cert. at 7-8, *Saldano v. Texas*, 530 U.S. 1212 (2000). To uphold the Fifth Circuit's decision could result in further unnecessary and unduly protracted litigation of issues, and failure to protect the individual rights of those sentenced to death.

ARGUMENT

Over the years, the Fifth Circuit has struggled in several instances to come to grips with the teaching of this Court in capital habeas corpus cases. The Circuit continues to develop its own, unwarrantedly restrictive, practices in its initial consideration of whether or not to grant a Certificate of Appealability ("COA"). As a result, this Court is called on again to ensure that the proper grant of a COA, the gateway step to full federal appellate review of a death penalty case arising out of a state court, is not hindered by the Fifth Circuit's adherence to practices that fail to follow this Court's precedents.

I. THE FIFTH CIRCUIT HAS REPEATEDLY FAILED TO FOLLOW THIS COURT'S PRECEDENT CONCERNING ISSUANCE OF A COA.

This Court has at least twice corrected the Fifth Circuit's uncommonly restrictive approach to granting COAs, in *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (*"Miller-El I"*), and *Tennard v. Dretke*, 542 U.S. 274, 283-84 (2004).

A. This Court Has Clearly Articulated the Standards for Granting a COA.

A state prisoner who has been denied habeas corpus relief in the federal court, but aspires to reverse that decision on appeal, must first obtain a COA under 28 U.S.C. § 2253(c)(1). A COA issues where there is "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This Court's precedents explain that a petitioner must "sho[w]

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (some internal quotation marks omitted)). The prisoner is not "require[d to make] a showing that the appeal will succeed." *Miller-El I*, 537 U.S. at 337. Instead, the prisoner need only "prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Id.* at 338 (quoting *Barefoot*, 463 U.S. at 893).

This Court has clarified that the COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336. Nonetheless, absent a COA, "an appeal may not be taken to the court of appeals." 28 U.S.C. § 2253(c)(1). Consequently, until a COA has issued, the federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners. *Miller-El I*, 537 U.S. at 336.

B. This Court Was Required to Reiterate the Standards for Issuance of a COA in *Miller-el v. Cockrell*, 537 U.S. 322 (2003).

In *Miller-El I*, the Fifth Circuit had denied a certificate of appealability on a claim that the state at Miller-El's trial had exercised peremptory strikes on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court had "no difficulty concluding that a COA should have

issued," and reversed. 537 U.S. at 341, 344. "[Q]uestion[ing]" the Fifth Circuit's "dismissive and strained interpretation of petitioner's evidence," the Court "once again examine[d]" when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus, and it "decide[d] again" that a COA only required a threshold inquiry into the underlying merit of the prisoner's claims. *Id.* at 326-27. Instead, the Fifth Circuit had "decid[ed] the substance of [the] appeal." *Id.* at 342. The Court found that doing this not only "undermine[d] the concept of a COA," but meant the Fifth Circuit was, "in essence, deciding an appeal without jurisdiction." *Id.* at 337, 342.

The Court "reiterate[d]" that "[c]onsistent with our prior precedent and the text of the habeas corpus statute a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Id.* at 327 (quoting 28 U.S.C. § 2253(c)(2)). This meant that a prisoner only needed to establish that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* It is apparent from its language that this Court was required by the Fifth Circuit's opinion to restate existing law, rather than declare any new standards.

The Court described the prosecutors' use of peremptory strikes to eliminate 10 out of 11 eligible black jurors, including striking black jurors who gave answers comparable to those of white jurors, twice using a Texas procedure called a jury shuffle to

move blacks lower on the list of potential jurors, and adopting differing questioning techniques for white and black jurors. *Miller-El I*, 537 U.S. at 331, 333-34, 343-45. The appearance of racial discrimination was further compounded by the long-standing and specific policy of the Dallas County District Attorney's Office of excluding minority venirepeople from juries. *Id.* at 334-35. The Court noted that only the federal magistrate judge had addressed the importance of that historical policy, which the magistrate had found to be "unexplained and disturbing." *Id.* at 347.

This Court stated that it would have had "no difficulty concluding that a COA should have issued," remarking that both the district court and the Fifth Circuit "did not give full consideration to the substantial evidence petitioner put forth," which suggested that prosecutors had systematically excluded blacks from Miller-El's jury, but rather accepted "without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial." *Id.* at 341. This Court's considerable concern about the Fifth Circuit's handling of Miller-El's claim caused it to specifically "question" that court's "dismissive and strained interpretation of petitioner's evidence of [racially] disparate questioning," *id.* at 344, as well as noting that the statistical evidence of racially motivated strikes alone raised an inference of discrimination, *id.* at 342.[2] The Court noted that "[w]hether a

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[2] The Court also noted the Fifth Circuit's adoption of an incorrect standard which improperly merged the requirements of two statutory subsections, 28 U.S.C. § 2254(d)(2) and (e)(1).

comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred." *Id.* at 343.

Remarkably, this Court was later again required to address the same case in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"). The Fifth Circuit had granted a COA, but had again rejected Miller-El's claims rather than considering the substantial evidence of racially motivated decision-making earlier recited by this Court's majority.

Upon being obliged to further review the case, this Court reversed and remanded for entry of judgment for Miller-El. 545 U.S. at 266. In doing so, the Court reiterated much of its *Miller-El I* reasoning, while also criticizing the Fifth Circuit's conclusion as being "as unsupportable as the 'dismissive and strained interpretation' of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability." *Id.* at 265. This Court specifically criticized the Fifth Circuit for wandering beyond the record to hypothesize reasons why one particular juror had been struck, stating its "rationalization . . . was erroneous as a matter of fact and law," and admonished the lower court that its substituted reason could not satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. *Id.* at 250-52. The fact that this Court, in

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Id. at 341.

full review of the merits, adopted an argument that the Fifth Circuit thought did not even merit COA review demonstrates the stringency of that Circuit's COA standard.

C. The Errors Identified in *Miller-El* Continue to Influence Buck's Case.

The Fifth Circuit's flawed analysis of the evidence of racially disparate practices in *Miller-El I* is continued in its approach in Mr. Buck's case. Despite the overt injection of race as a factor for consideration by the jury in Mr. Buck's case by Buck's own counsel, which the Texas Attorney General had acknowledged was constitutional error, first the district court and then the Court of Appeals denied a COA, with the latter rejecting the case as "unremarkable" and not debatable. *Buck v. Stephens*, 623 F. App'x 668, 673-74 (5th Cir. 2015).

Moreover, in *Buck*, the panel went through the relevant factors one by one, determining that the facts and reasons offered in support of each were not "extraordinary," as required by Fed. R. Civ. P. 60(b)(6) and *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). *Buck*, 623 F. App'x at 672-74. This piecemeal approach had much the same effect as did the Fifth Circuit's approach in *Miller-El II*, 545 U.S. at 265, where this Court noted that, viewed cumulatively, the evidence that had been discounted by the Fifth Circuit was "too powerful to conclude anything but discrimination." *Id.* And, as in *Miller-El I*, the Fifth Circuit's misguided approach also calls for correction because it came in the context of a COA application, resulting in the lower court "deciding [Buck's] appeal without jurisdiction." *Miller-El I*, 537 U.S. at 336-37.

II. THE FIFTH CIRCUIT'S SELF-CREATED RULES TEND TO IMPERMISSIBLY DISFAVOR THE GRANT OF HABEAS CORPUS RELIEF.

In the year after *Miller-El*, this Court was forced to again address the Fifth Circuit's COA standard in *Tennard v. Dretke*, 542 U.S. 274, 283 (2004). While the Court noted that the Fifth Circuit paid "lipservice" to the principles articulated in *Miller-El*, it found that the Fifth Circuit "invoked its own restrictive gloss" on this Court's precedents. *Id.* Thus, in addition to previously having had to correct the Fifth Circuit's unusually burdensome approach to granting COAs, this Court has had to repeatedly re-explain substantive aspects of its already clear jurisprudence in cases arising out of the Fifth Circuit.

A. The Fifth Circuit's Consideration of a COA Again Required This Court's Intervention: In *Tennard*, 542 U.S. 274, 283 (2004).

This Court's seminal decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("Penry I"), reversed a Texas petitioner's death sentence because evidence of his intellectual disability and childhood abuse could not be given effect under the Texas death penalty statute as it then stood. In the years that followed, few of the other petitioners seeking new sentencing proceedings on the same ground succeeded, as the Fifth Circuit developed an anomalous standard for determining the "constitutional relevance" of proffered mitigation evidence, requiring such evidence to establish a

"uniquely severe permanent handicap" that was not attributable to fault on the part of the defendant, and was shown to have a causative link to the offense in question (the "nexus" requirement). *See Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002).

The Fifth Circuit's adherence to its own "constitutional relevance" jurisprudence persisted after this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Holding that the death penalty is disproportionate when applied to people with intellectual disability (mental retardation), *Atkins* took the view that evidence of intellectual disability, whether or not explicitly connected by some "nexus" to the defendant's crime, inherently mitigates a retarded defendant's moral culpability. *Id.* at 316, 318. The Fifth Circuit continued to cling to its self-created "constitutional relevance" standard despite the subsequent decisions of this Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), which invalidated death sentences because of defense counsels' failure to investigate and develop mitigating evidence. In neither case had the Court suggested that the defendant was required to prove the existence of a "uniquely severe" condition or a "nexus" linking that condition to the offense.

In due course, another death-sentenced Texas inmate whose sentencing evidence indicated that he had an IQ of 67, indicating low intelligence, challenged the Fifth Circuit's disposition of his case, in which the Fifth Circuit had rejected his claim based on *Penry v. Lynaugh* and denied a COA.

Tennard v. Cockrell, 284 F.3d 591 (5th Cir. 2002). Judge Dennis, dissenting from the denial of a COA, noted that the majority, in reaching its decision, had disregarded the holdings of this Court in *Penry*, and relied instead on circuit decisions based on *Penry*'s dicta, which were not "clearly established federal law" for the purpose of 28 U.S.C. § 2254(d)(1). *Tennard*, 284 F.3d at 598-604.

This Court granted Tennard's petition for certiorari, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)." *Tennard v. Cockrell*, 537 U.S. 802 (2002). The Fifth Circuit on remand reinstated its previous opinion, *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003), holding that Tennard had never raised an *Atkins* claim per se, but had argued that the jury instructions did not provide a vehicle for giving effect to his mitigating evidence. The Fifth Circuit therefore did not reconsider its "constitutional relevance" requirement, but simply reinstated its original panel opinion.[3] Judge Dennis again dissented from the restored panel opinion.

1. Despite This Court's Stated Principles for Issuance of a COA, the Fifth Circuit Proceeded Along "a Distinctly Different Track."

Returning to this Court on a further petition for

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[3] *Tennard v. Cockrell*, 317 F.3d 476, 477 (5th Cir. 2003) (Dennis., J., dissenting) (same).

writ of certiorari, Tennard again sought consideration of his claim that the jury instructions given pursuant to the Texas sentencing statute were an inadequate vehicle for consideration of his evidence. Tennard also specifically asserted that the Fifth Circuit had incorrectly construed the standards for issuance of a COA, which had been recently reaffirmed by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

This Court agreed with Tennard, remarking that "[d]espite paying lipservice to the principles guiding issuance of a COA, *Tennard v. Cockrell*, 284 F.3d, at 594, the Fifth Circuit's analysis proceeded along a distinctly different track. Rather than examining the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on *Penry I*." *Tennard v. Dretke*, 542 U.S. 274, 283 (2004).

The Court further noted that the Fifth Circuit's test "has no foundation in the decisions of this Court . Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment. Indeed, the mitigating evidence presented in Penry I was concededly relevant . so even if limiting principles regarding relevance were suggested in our opinion– and we do not think they were– they could not have been material to the holding." *Tennard*, 542 U.S. at 284.

Thus, it was ultimately necessary for this Court to affirmatively reject the Fifth Circuit's test, which was "inconsistent with [the] principles" set out in this Court's foundational Eighth Amendment cases:

Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence); *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (same); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990) (mitigating evidence is any evidence that tends to warrant a sentence less than death); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (sentencer must not be precluded from considering any relevant mitigating evidence). *See Tennard*, 542 U.S. at 284-87 (finding that Fifth Circuit was "wrong to have refused to consider the debatability of the *Penry* question" and had assessed Tennard's *Penry* claim under "an improper legal standard" that "has no basis in our precedents").[4] After performing "the analysis the Fifth Circuit should have conducted," *Tennard*, 542 U.S. at 288-89, this Court concluded that Tennard's low IQ evidence was relevant in mitigation, and that the Texas Court of Criminal Appeals' application of *Penry* to the facts of Tennard's case was unreasonable. *Id.* at 288.

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[4] Cases where the Fifth Circuit's "constitutional relevance" test was applied included *Bigby v. Cockrell*, 340 F.3d 259, 273 (5th Cir. 2003); *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (en banc); *Nelson v. Cockrell*, 77 F. App'x 209, 213 (5th Cir. 2003); *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002); *Blue v. Cockrell*, 298 F.3d 318, 320-21 (2002); *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995); *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994); *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc).

2. Even After *Tennard*, the Fifth Circuit Continued to Adhere to Its Own Jurisprudence Rather Than This Court's Precedents.

The Fifth Circuit's difficulty with the correct interpretation of *Penry I* continued even after *Tennard*. Within three years, this Court was compelled to grant certiorari in two companion cases, *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Brewer v. Quarterman*, 550 U.S. 286 (2007). In *Abdul-Kabir*, the petitioner had unsuccessfully sought habeas relief in the district court. He appealed; the Fifth Circuit affirmed, denying a COA on his claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), that because they lacked an instruction concerning mitigation evidence, the jury instructions given, based on the Texas sentencing statute, had prevented the jurors from giving meaningful consideration to his evidence of neurological damage and childhood neglect and abandonment. *Cole v. Dretke*, 99 F. App'x 523 (5th Cir. 2004). *Abdul-Kabir*, 550 U.S. at 244-46. This Court specifically ordered reconsideration in light of *Tennard*. *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004). Although this time the Fifth Circuit granted a COA, it adhered to its prior decision and refused rehearing en banc over dissent. *See Cole v. Dretke*, 443 F.3d 441, 442 (5th Cir. 2006). Even post-*Tennard*, the Fifth Circuit distinguished *Penry* on the basis that Mr. Cole's neurological impairments were not necessarily permanent, and held that evidence of neglect and abandonment as a child was capable of being considered by the jury, even absent a

mitigation instruction. *Cole v. Dretke*, 418 F.3d 494, 506-07 (5th Cir. 2005).

In again remanding the case, this Court reiterated that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty, notwithstanding the severity of the crime or the inmate's potential to commit similar offenses in the future. *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). In doing so, the Court extensively reviewed the precedents, including *Tennard*'s rejection of the Fifth Circuit's "constitutional relevance test," that should have informed the lower courts' disposition of the case. It ultimately noted that "our post-*Penry* cases are fully consistent with our conclusion that the judgment of the Court of Appeals in this case must be reversed." *Id.* at 264-65.

In *Brewer v. Quarterman*, 550 U.S. 286 (2007), the district court, in the immediate wake of this Court's decision in *Tennard*, had granted penalty phase relief, *Brewer v. Dretke*, No. 2:01-CV-0112-J, 2004 U.S. Dist. LEXIS 14761 (N.D. Tex. Aug. 2, 2004), only for that decision to be overridden by the Fifth Circuit, *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006). The Fifth Circuit's opinion, despite *Tennard*'s emphasis on an expansive approach to mitigation evidence, drew categorical distinctions between childhood abuse and mistreatment as an adolescent, and between mental retardation and mental illness. *Brewer*, 442 F.3d at 279 n.16, 280. This Court reversed, lamenting that "[f]or reasons not supported by our prior precedents, but instead

dictated by what until quite recently has been the Fifth Circuit's difficult *Penry* jurisprudence," the Fifth Circuit had concluded that the denial of a mitigation instruction had not violated *Penry*. This Court noted that the Fifth Circuit had created a "sufficient evidence" standard, although such a requirement for a certain quantum of evidence was suggested "[n]owhere in our *Penry* line of cases." *Brewer*, 550 U.S. at 294. It also remarked that the Fifth Circuit's conclusions that certain categories of mitigation evidence did not require a mitigation instruction had "fail[ed] to heed the warnings that have repeatedly issued from this Court" regarding the extent to which the jury must be allowed to respond to mitigating evidence "in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Id.* at 296.

B. Mr. Buck's Case Is an Appropriate One for This Court to Reinforce the Correct Application of Its COA Standards in the Fifth Circuit.

This Court set out clear explanations, first in *Penry*, and subsequently in *Tennard*, of the constitutional imperative that a sentencing jury must be able to adequately weigh and give effect to any evidence that might tend to warrant a sentence less than death. Nonetheless, this Court was obliged repeatedly to remedy the Fifth Circuit's failure to correctly apply this Court's substantive legal decisions in those cases. The Court has also repeatedly been required to correct the Fifth Circuit's jurisprudence and set it back on course

when it has failed to correctly apply this Court's COA standards also clearly articulated, not least in *Miller-El*, which arose out of the Fifth Circuit itself.[5]

Mr. Buck's case is one where the Fifth Circuit has, once again, clearly failed to implement this Court's teaching concerning the issuance of a COA. Instead, it leapfrogged to a conclusion on an issue which members of this Court have indicated is at least debatable, rather than taking the required procedural step of simply deciding whether a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), had been made, and ordering full appellate briefing. Thus, the "bizarre and objectionable" testimony concerning race, given by the "'defense expert'" at Mr. Buck's trial, *Buck v.*

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[5]A further instance of the Fifth Circuit going its own way in habeas corpus proceedings, while also failing to comply with this Court's guidance on the grant of a COA, has occurred in cases where *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (permitting petitioners to invoke ineffective assistance of collateral counsel as "cause" to excuse a procedurally default claim of ineffective assistance of trial counsel), has been invoked by petitioners who have also been denied funding in federal court to develop claims previously defaulted by state habeas counsel. Not only has the Fifth Circuit maintained its practice of deciding the merits of such cases rather than simply applying the threshold COA analysis, but it adds its own "restrictive gloss" to the funding statute, 18 U.S.C. § 3599. That statute requires only a demonstration that funding is "reasonably necessary," whereas the Fifth Circuit applies a self-created "substantial need" test, which the petitioner typically fails. *See, e.g., Wilkins v. Stephens*, 560 F. App'x 299, 314 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1397 (2015); *Crutsinger v. Stephens*, 576 F. App'x 422, 429-30 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1401 (2015).

Thaler, 132 S. Ct. 32, 33 (Alito, J., respecting denial of certiorari), currently stands un-remedied, both because of the State of Texas' broken promise not to stand in the way of relief, and because of the Fifth Circuit's failure to observe this Court's prior instruction. Providing the Fifth Circuit in this instance with further clear direction for the conduct of habeas corpus proceedings, and particularly appellate review of those proceedings, will not only serve the interests of individual litigants, but reduce the likelihood that this Court will continue to be called on repeatedly to resolve aberrant interpretations of its precedent.[6]

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[6] For example, the Fifth Circuit panel in this case declined to answer whether its usual Fed. R. Civ. P. 60(b) standards set the standard for Fed. R. Civ. P. 60(b)(6) in habeas proceedings. *See Buck v. Stephens*, 623 F App'x 668, 672 (5th Cir. 2015) (citing *Diaz v. Stephens*, 731 F.3d 370, 376-77 n.1 (5th Cir. 2013) (noting that "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting")). Requiring a different standard for granting Fed. R. Civ. P. 60(b) relief in capital habeas cases would directly contravene this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the Court firmly rejected the argument that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") impliedly repealed Rule 60(b)(6), holding that "Rule 60(b) has an unquestionably valid role to play in habeas cases," albeit that that role may be constrained where successive habeas petitions are involved. *Gonzalez*, 545 U.S. at 534-35.

CONCLUSION

Amici ask that this Court reverse the decision below.

Respectfully submitted,

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August 4, 2016